86-720

No. .....

Supreme Court, U.S.
FILED
OCT 28 1986
JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1986

LOOART PRESS, INC.,
Petitioners,

v.

CALIFORNIA STATE BOARD OF EQUALIZATION,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FIRST APPELLATE DISTRICT

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QUESTIONS PRESENTED

1. Whether the imposition of use tax liability on an out-of-state vendor absent any showing of the constitutionally required "nexus" constitutes a violation of due process.

2. Whether the assessment of use taxes against an interstate mail order vendor, based solely upon wholesale sales which are completely unrelated to the subject mail order sales, is unconstitutional.

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Petitioner Looart Press, Inc. prays that a writ of certiorari issue to review an opinion and judgment of the California Court of Appeal, First Appellate District, reversing a judgment of the Superior Court of the State of California for the City and County of San Francisco.

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OPINIONS BELOW

The unpublished opinion of the California Court of Appeal is set forth at page A3 of the Appendix. The unpublished judgment of the Superior Court of San Francisco, California is set forth at page A9 of the Appendix.

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JURISDICTION

The California Court of Appeal entered its opinion and judgment on April 16, 1986 and denied a rehearing on May 12, 1986. (Appendix, p. A2) This petition is filed within 90 days of July 30, 1986, when the California Supreme Court denied a timely petition for hearing (Appendix, p. A1). This Court's jurisdiction is invoked under 28 U.S.C. Section 1257(3).

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

"[N]or shall any state deprive any person of life, liberty, or property without due process of law. . . ."

STATEMENT OF THE CASE

Plaintiff/petitioner Looart Press, Inc. ("Looart") hereby petitions this Court for a hearing to review the decision of the Court of Appeal of the State of California, First Appellate District, Division Four ("Court of Appeal"), filed on April 16, 1986. The Court of Appeal, in patent disregard of the due process requirements mandated by the Fourteenth Amendment and the constitutional guidelines set forth by this Court, reversed, as a matter of law, the judgment of the trial court below, which had held that the State of California improperly assessed plaintiff for use taxes on interstate mail order sales to California residents. The trial court had determined, based on the evidence before it, that there was not the requisite "nexus" between plaintiff and the State to justify imposition of the disputed tax. The Court of Appeal reversed, and remanded merely for a redetermination of the actual amount of tax due.

Hearing by this Court is required to settle an important question of constitutional magnitude regarding the extent to which the Fourteenth Amendment permits a state to impose use tax liability upon an out-of-state mail order vendor. This question has far reaching implications which not only affect the nation's entire mail order industry, but touch upon the broader constitutional issue of a State's ability to effect a tax beyond the limits of its jurisdiction. The California Court of Appeal failed to adhere to the constitutional standards and guidelines established by this Court in *National Geographic v. Cal. Equalization Bd.* (1977) 430 U.S. 551 and *National Bellas Hess v. Dept. of Revenue* (1967) 386 U.S. 753. The peremptory reversal of the trial court's decision by the Court of Appeal constitutes a violation of plaintiff's due process rights and warrants reversal.

Looart, a Colorado corporation, brought this action for refund of California use taxes in the sum of $454,-389.93, plus interest, which it paid under protest as a result of an assessment by the California State Board of Equalization ("Board") on all interstate mail order sales of stationery items by plaintiff, under the name "Current, Inc." ("Current"), to California residents between 1972 and April 30, 1976.

The matter was tried, in part, upon Stipulated Facts, supplemented by additional testimony and exhibits.* The evidence established that the plaintiff corporation resulted from a merger of two separate corporations, each marketing different products in a different manner: Looart manufactured and sold custom Christmas cards and wedding invitations nationwide, only at wholesale; Current manufactured and sold economy stationery, cards and miscellany, only by mail order. The corporate merger was solely a matter of form. After the merger, Looart and Current each continued to operate its respective business under separate names and entirely separate from one another.

During the years in question, Looart marketed its custom Christmas cards in California, at wholesale, through Christmas Publishers Group ("CPG"), an independent California corporation. CPG selected the retailers and placed catalogues and boxed cards with them. The retailers ordered from CPG; the customer dealt directly with the retailer. During the period in question, $763,632 of Looart cards were sold by retailers. All applicable sales taxes were paid by the retailers on those sales.

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* The stipulated facts which were made part of the official clerk's transcript below are set forth at pp. A11 through A32 of the Appendix.

During the same period of time, Current sold $7,007,-138 in stationery and other economy items to California residents, exclusively by means of interstate commerce. It is undisputed that there was no connection, relationship or identification between the Looart wholesale sales to CPG and the Current interstate mail order sales; it is further undisputed that the wholesale sales of Looart products in California conferred no benefit upon the Current mail order business.

Board assessed the contested use tax upon all of Current's mail order sales to California residents, contending that the maintaining of an independent agent in California, whose connection was solely with the Looart wholesale sales, constituted a sufficient taxing "nexus." Plaintiff contended, *inter alia*, that there was no constitutionally sufficient taxing "nexus" between it and the State of California to justify imposition of the subject use tax upon Current's mail order business.

The trial court found in favor of plaintiff and ordered restitution of the taxes paid, together with interest.

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STATEMENT OF FACTS

Looart is a Colorado corporation which was formed on July 31, 1950 by Orin Loo. Its sole place of business has always been Colorado Springs, Colorado. Looart designed and marketed custom Christmas cards which were sold at wholesale, under the tradename, "Looart," to quality retail establishments nationwide. (Stip. No. 7, p. A13)[1]

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[1] "Stip" refers to the Stipulated Facts which have been set forth in the Appendix hereto; "p. A13" refers to the Appendix page reference where the particular stipulation may be found.

In 1950-1951, Mr. Loo's wife founded her own independent business, which she operated out of the basement of her home under the name, "Current;" it was subsequently incorporated in Colorado on November 1, 1960, under the name, "Current, Inc." Mrs. Loo manufactured postcards and other stationery items which were sold solely by mail order, primarily to church groups to be used in fund-raising activities. (Stip. Nos. 6, 55, pp. A13, A24)

The two companies were operated entirely separate from each other. The business, market, advertising and customers of each company were entirely independent and distinct. There was no identification between the companies. Neither of the Loos worked in the business of the other.

In 1966, Current and Looart moved into the same building, but continued to operate as two entirely separate entities, maintaining separate payrolls, employees, records and businesses. They merely shared manufacturing facilities, the costs of which were allocated between the two corporations in accordance with their respective use.

On July 13, 1967, the companies formalistically merged into a single corporation. (Stip. No. 5, p. A13) The merger of the two companies did not in any material respect alter the way either Looart or Current conducted its respective business; each continued to operate under its original name, in an entirely separate and independent manner, with no similarity in product, market, advertising or customers. (Stip. Nos. 8-10, 31, pp. A14-A15, A19)

After the merger, Current's mail order business continued to be conducted solely under the name, "Current, Inc." (Stip. No. 8, p. A14) Its products continued to be

marketed and sold directly to consumers solely by means of interstate commerce. (Stip. No. 8, p. A14)

Looart's custom Christmas card business continued to be conducted solely under the Looart name. Its products continued to be sold only at wholesale to quality retail stores, which then sold them at retail. (Stip. Nos. 34-35, p. A19) There were never any retail sales by plaintiff of Looart products in California. (Stip. No. 35, p. A19) Looart custom Christmas cards were marketed in California through CPG, an independent California corporation, only during the Christmas card season. (Stip. No. 34, p. A19) Looart had no interest in, or control over, CPG. CPG marketed Looart cards to retailers; it also marketed the cards of other manufacturers, and its own cards, all of which competed with Looart cards, to the same retailers. (Stip. No. 35, p. A19) CPG operated solely through its own employees. It selected the retailers with whom it placed the albums. (Stip. No. 47, p. A23) Looart had no contact, direct or indirect, with any customer of its cards; indeed, Looart did not even know the identity of the retail customers who purchased its cards. No Looart employees were involved in the sale of cards or placing the catalogues in retail stores in California.

CPG had no contact with or connection with Current or its products. No Current product was sold in any manner except by mail order through interstate commerce.

The products of the two companies were directed to entirely different markets: Looart to the affluent custom market; Current to the economy market. (Stip. Nos. 22, 24, p. A17) They did not attempt to sell in the same market or to the same customers. (Stip. Nos. 17-31, pp. A16-A19) The products were entirely dissimilar. Neither company used the name of the other in any manner. (Stip. Nos.

14-21, pp. A15-A17) There was no attempt to crossover or correlate products, marketing, or customers. (Stip. Nos. 17, 29, 31, pp. A16-A19)

The advertising, promotion and sale of the two lines of products continued to be conducted as if there were no connection between the two businesses. (Stip. Nos. 20, 21, 24-29, 31, pp. A17-A19) Products marketed under the name, "Current, Inc.," were advertised by the direct mailing of catalogues to lists of prior mail order purchasers of Current products or to names which had been obtained from other mail order houses. (Stip. No. 27, p. A18) No reference was ever made in the Current catalogues to the name "Looart Press, Inc.," "Looart," or to any derivation thereof, or to any of the Looart products. (Stip. No. 21, p. A17) Current never attempted to obtain any of the names of customers who had purchased the Looart line of products in order to send Current catalogues to them. (Stip. No. 28, p. A18)

Looart products were marketed in a manner entirely different than Current's mail order items. (Stip. Nos. 24-31, pp. A17-A19) Looart advertising appeared solely in trade journals or at trade shows, and was directed solely to retailers. Looart custom cards were sold to retailers in California solely by CPG. (Stip. Nos. 39, 43, pp. A21-A22) No reference was ever made to th name, "Current. Inc.," or any derivation thereof, or to any product of Current. (Stip. No. 20, p. A17) Plaintiff did not attempt to sell Looart products to Current's customers.

The internal operations of the two companies were also entirely separate and independent. (Stip. Nos. 9-16,

pp. A14-A16) Separate accounts receivable and expense accounts were maintained (Stip. Nos. 11, 16, pp. A15-A16); separate income and expense records, separate profit and loss analyses, and separate budgets were maintained for each company. (Stip. Nos. 11, 13, p. A15) Separate inventories were maintained. (Stip. No. 12, p. A15) The employees who had worked for the respective companies prior to the merger continued to work solely on the manufacture and sale of the products of that company; employees of the respective companies performed their duties as though no merger had occurred. (Stip. Nos. 9, 10, p. A14) Separate customer service departments were maintained by each company. (Stip. No. 15, p. A16)

Separate checking accounts, under the separate company names, were strictly maintained. (Stip. No. 16, p. A16) Separate letterhead, bearing the name, "Current, Inc.," or the name, "Looart Press, Inc.," was used in the conduct of each business. (Stip. No. 14, p. A15) There was never any interchange of product logo or identification.

Thus, as Board conceded, for all intents and purposes the merger of the two companies had no effect upon the nature of the two businesses, the manner in which they were conducted, the products they marketed, or the customers they served. (Stip. No. 64, p. A27) The products of each company bore only the name of that company. (Stip. Nos. 18-19, p. A17) There was no crossover of advertising or reference to the products or name of the other company. (Stip. Nos. 17, 20-21, pp. A16-A17) It is *undisputed* that there was no way in which the customer of the product of one company could be aware of any corporate association or identification with the other. (Stip. No. 29, p. A18)

Even more significant, *the merger did not in any way affect the contacts or the relationship between either of the two businesses and the State of California.* (Stip. Nos. 30, 40, pp. A18, A21) The evidence is *undisputed* that there was no relationship or connection between the wholesale sales of Looart products in California through CPG and Current's interstate mail order sales. Current's sales received no benefit from the Looart sales in California either before or after the merger. In fact, Current sales into California increased substantially after all Looart wholesale sales in the State were terminated.

Board conceded that it imposed the subject tax upon plaintiff for Current's interstate mail order sales based solely upon the wholesale sales of Looart cards in California and the corporate form under which the two businesses were being conducted. (Stip. No. 64, p. A27)

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REASONS FOR GRANTING THE WRIT

I.

THE IMPOSITION OF USE TAX LIABILITY ABSENT A SHOWING OF THE REQUISITE CONSTITUTIONAL "NEXUS" CONSTITUTES A VIOLATION OF DUE PROCESS

The central question in this case is whether the wholesale sales of Christmas cards in California by an agent of plaintiff provided a sufficient connection between plaintiff and the State of California—as required by the Due Process clause of the United States Constitution—to permit California to impose use taxes upon plaintiff, an out-of-state vendor, for interstate mail order sales of entirely unrelated products to California residents.

A state may *not* require a seller to collect use taxes upon sales made solely through means of interstate commerce where the seller has no substantial connection with the State. (*National Bellas Hess v. Dept. of Revenue* (1967) 386 U.S. 753; *Miller Bros. Co. v. Maryland* (1954) 347 U.S. 340, 345)

The taxing state must "adequately establish a relationship or 'nexus' between the [taxpayer] and the State" for the imposition of use tax to be constitutional. (*National Geographic v. Cal. Equalization Bd.* (1977) 430 U.S. 551, 556) That "nexus" must be based upon some *substantial connection* with the taxing state; a *mere physical presence will not justify imposition of such a tax.* (*Ibid.*)

A.

The Decision Of The Court Of Appeal Is Patently In Conflict With Controlling Decisions Of This Court

In accordance with the constitutionally mandated standards and procedures set forth by this Court, the trial court below properly examined and weighed the evidence before it, and thereupon determined that the requisite "nexus" did not exist between plaintiff and the State of California.

The Court of Appeal, in total disregard of the findings of the trial court and the constitutional requirements pertinent thereto, determined, as a matter of law, that the assessment of use taxes against plaintiff was entirely appropriate. In doing so, it completely ignored the requisite constitutional guidelines established by this Court.

1.

The Court Of Appeal Applied An Improper Constitutional Standard

Contrary to the holding of the California Court of Appeal, the "mere presence" of a taxpayer in the taxing state, in and of itself, is clearly *not sufficient* to justify imposition of a use tax. (*Miller Bros., supra,* 347 U.S. at 345; accord, *National Geographic, supra,* 430 U.S. at 556) Yet, despite this Court's disavowance in *National Geographic* of a "slightest presence" standard of constitutional "nexus,"[2] that standard appears to have been resurrected by the Court of Appeal. Plaintiff submits that this "slightest presence" standard adopted by the California court is not the law, and has not been for more than 30 years. Its application in the within action constitutes a patent violation of plaintiff's fundamental due process rights.

The Court of Appeal framed the "pivotal" issue on appeal as "whether the state's nexus must be with the activities of . . . Current . . . or whether it is sufficient if the state is connected with *any* part of [plaintiff's] operations. . . ." (Appendix, p. A5, emphasis added) It held, as a matter of law, that Board established a sufficient "nexus" between California and plaintiff *merely* by establishing a connection between plaintiff and its agent, CPG. (Appendix, p. A7) Plaintiff submits that

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2 "Our affirmance of the California Supreme Court is not to be understood as implying agreement with that court's 'slightest presence' standard of constitutional nexus." (*National Geographic, supra,* 430 U.S. at 556)

the issue, as framed by the Court of Appeal, completely misconstrues the law on this question and misstates the holding in *National Geographic.* Moreover, the constitutional standard applied by the California court to determine requisite "nexus" is contrary to the controlling decisions of this Court.

Indeed, in *Miller Bros., supra,* 347 U.S. 340, this Court refused to uphold imposition of a state use tax *despite* plaintiff's physical presence in the taxing state. Miller owned a retail store which was located in Delaware, near the Maryland border. Maryland residents frequently came to the store to make purchases, some of which were delivered into Maryland by Miller's own truck. Additionally, Miller's newspaper and radio advertising and sales circulars reached customers in Maryland. In an attempt to force plaintiff to collect its use tax on goods sold to Maryland residents, the State of Maryland seized plaintiff's delivery truck while it was in Maryland making deliveries.

This Court held that the State's action "violated plaintiff's constitutional rights;" that the "definite link" or "minimum connection" required between a state and the entity it seeks to tax was missing, and therefore, the requirements of due process had not been met. (*Id.* at 344-345) It was expressly noted that something *"more substantial than mere presence"* must be established for the state to have an adequate basis for taxation. (*Id.* at 345, emphasis added) That standard was reaffirmed in *National Geographic.* (*National Geographic, supra,* 430 U.S. at 561)

2.

The Court Of Appeal Has Repudiated This Court's Holding In National Bellas Hess

This Court has expressly held that a state may *not* require a seller to collect use tax upon sales made solely through means of interstate commerce where the seller has no substantial connection with the State. (*National Bellas Hess, supra,* 386 U.S. at 758) In that case, in which this Court dealt specifically with the application of a use tax upon interstate mail order sales, it was held that Illinois could *not* impose use tax liability on an out-of-state corporation whose only contact with the state was exclusively through means of interstate commerce. National Bellas Hess was a mail order company located in Missouri. It had no offices or agents in Illinois. Its contact with the state was similar to that of Current: *i.e.,* twice yearly it mailed catalogues to past and potential customers across the country; all customer orders were mailed out-of-state and goods ordered were sent from out-of-state by mail or common carrier.

In determining whether National Bellas Hess could be held liable for use taxes on its mail order sales into Illinois, the critical question considered by this Court was the *connection,* if any, between that company and the state. This Court noted that National Bellas Hess used Illinois banking and credit facilities to carry on its business in Illinois because (unlike plaintiff in the case at bar) a substantial portion of its mail order sales was on credit. However, the majority found such contacts to be *too indirect and too insubstantial* to justify a tax on a business which was otherwise conducted solely through means of interstate commerce.

> "In order to uphold the power of Illinois to impose use tax burdens on National in this case, we would have to repudiate totally the sharp distinction which [we] have drawn between mail order sellers with retail outlets, solicitors, or property within a State, and those who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business. But this basic distinction . . . is a valid one, and we decline to obliterate it." (*National Bellas Hess, supra*, 386 U.S. at 758)

California's imposition of its use tax upon plaintiff based solely upon Current's mail order sales constitutes a blatant repudiation of the holding in *National Bellas Hess*. Plaintiff has no retail outlets, solicitors, or property within California that have any relationship whatsoever to Current's mail order sales. Current's business was not related to, connected with or benefitted by *any* of the Looart wholesale sales, which provided plaintiff's *only* connection with California. Current did no more than communicate with its customers in this State by mail or common carrier. This Court refused to allow imposition of a state tax on such a mail order seller in *National Bellas Hess;* to do otherwise in the instant case would be to create a distinction with constitutional repercussions where none exists.

3.

The Court Of Appeal Improperly Decided, As A Matter Of Law, The Issue Of Requisite Constitutional "Nexus"

The determination of whether the requisite "nexus" exists between a taxing state and an out-of-state mail order retailer must be made based upon a careful examination and evaluation of all relevant facts and circumstances.

(*National Geographic, supra,* 430 U.S. at 556) It is to the *facts* of National Geographic's connection with the State of California that this Court looked in order to determine whether the necessary "definite link" existed. The reiteration and emphasis of the *nature of the contacts* between National Geographic and the State of California, and the *quality and quantity of the activities* of National Geographic in the state, underlies its decision:

> "Our affirmance thus rests upon our conclusion that appellant's *maintenance of the two offices* in California *and activities there* adequately establish a . . . 'nexus. . . .'" (*National Geographic, supra,* 430 U.S. at 556, emphasis added)
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> * * *
>
> "We conclude that the Society's *continuous presence* in California *in offices that solicit advertising* . . . provides a sufficient nexus . . ." (*Id.* at 562, emphasis added)

The Court of Appeal made no such examination or evaluation. Instead, it summarily concluded that the mere connection between Looart and its agent, CPG, was sufficient, as a matter of law, to subject approximately seven million dollars in Current mail order sales to California use taxes. Apparently, under the Court of Appeal's reasoning, any connection between the state and taxpayer, no matter how tenuous, is sufficient to establish requisite constitutional "nexus." Therefore, by a simple extension of that logic, if the slightest connection between taxpayer and taxing state were all that be required, no examination or careful weighing of the facts and circumstances of each case would ever be necessary. Plaintiff submits that the logical extension of the Court of Appeal's line of reasoning is wholly inconsistent with *National Geographic.*

B.

The Facts Of The Instant Case Are Totally Disparate From Those Of Any Decision Which Has Found A Constitutional Taxing "Nexus" To Exist

In *National Geographic,* although affirming imposition of the use tax in that case, *this Court disavowed the holding of the California Supreme Court that the "slightest presence" of a foreign corporation in California could subject it to a use tax obligation upon sales made solely in interstate commerce.* (*National Geographic, supra,* 430 U.S. at 556) It held that in order to satisfy the requirements of the Due Process clause, *something more than a "slight presence" in the state is necessary to create a substantial enough "nexus" between the state and an out-of-state corporation to permit a use tax upon interstate sales.* (*Ibid.*)[3]

This Court specifically analyzed the facts before it and held that National Geographic had substantially more than a "slight presence" in the State, so that it could constitutionally be held liable for collection—and payment—of use taxes on its mail order sales into California. The distinction between the facts of the instant case and those which this Court emphasized as creating the taxing "nexus" in *National Geographic* highlights the *non-existence* of a constitutionally permissible taxing "nexus" in this case.

In *National Geographic,* the Society maintained *two offices in California,* one in Los Angeles, and the other in San Francisco, each staffed by four full-time employees.

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[3] In that decision, this Court dealt specifically with the same use tax statutes (California Revenue & Taxation Code §§ 6203, 6204) at issue here.

Those offices operated under the National Geographic name and performed services directly related to the publication and sale of the National Geographic Magazine. The employees of those offices solicited advertising for the magazine on a continuous basis which resulted in *approximately $1,000,000 in advertising revenue per year* for the Society's magazine. The National Geographic Society sold by mail merchandise which was advertised in the magazine it sent to subscribers. The merchandise was sent from out-of-state into California and payments were made following the purchaser's receipt of the merchandise. The merchandise advertised in the magazine was also available for sale at both California offices, and some retail sales were made.

This Court held that National Geographic's *continuous activity through its local offices, which produced substantial revenue, constituted a substantial presence in this State* which justified imposition of use taxes upon its interstate sales. *This Court also expressly held that the mere existence of some intrastate business was not necessarily sufficient to support such a tax:*

> "Appellant's maintenance of *two offices* in the State and *solicitation* by employees assigned to those offices *of advertising copy in the range of $1 million annually* . . . establish a much more *substantial presence* than the expression "slightest presence" connotes. Our affirmance thus rests upon *our conclusion that appellant's maintenance of the two offices in California and activities there adequately establish a relationship or 'nexus'* between the Society and the State that renders constitutional the obligations imposed upon appellant pursuant to §§ 6203 and 6204." (*National Geographic, supra,* 430 U.S. at 556, emphasis added)

Plaintiff has *never operated or maintained an office* in California. It retained CPG, a California corporation, to make wholesale sales of Looart cards to retailers. CPG was at all times a completely independent corporation. Significantly, *CPG paid California taxes,* including California income and property taxes, with regard to its business activities, which included the sale of Looart products. California thus received fair tax revenue for the benefits conferred by the State from the corporation which was, in fact, conducting the business, in addition to full collection of the sales tax on all of the merchandise sold. These facts also are diametrically different from the facts of *National Geographic,* where the corporation's million-dollar revenue from advertising sold by *its* California offices was not subject to taxation by the State of California. *National Geographic's* revenue producing activities within the State of California were not only ten times *greater* than its mail order sales into that State but they were also entirely *untaxed,* so that the State derived no payment for the *direct intrastate* benefits conferred upon the corporation.

Furthermore, plaintiff had nothing to do with the operation or supervision of the CPG business. Plaintiff simply had a contractual arrangement with CPG to market Looart products to retailers. CPG sold a number of other lines of cards, including its own products which competed with the Looart line. Plaintiff neither had nor attempted to exercise any control over the operation of CPG's business. It did not attempt to determine what other lines CPG marketed, or how or where it marketed them. Plaintiff never attempted to manage or supervise CPG's activities—even in relation to CPG's marketing of Looart

cards. These facts contrast sharply with those of *National Geographic*, since the out-of-state corporation maintained offices under the corporate name within the taxing state, and directed and controlled their activities. The evidence is undisputed *that the Looart intrastate sales had no connection with, and conferred no benefit, direct or indirect, upon, the Current sales.*

This Court emphasized that National Geographic *operated and maintained* two substantial offices in California which generated $1 million annual advertising revenue; National Geographic employees staffed those offices, solicited the advertising business, and sold at retail to consumers some of the same merchandise advertised in the magazine. Those activities created sufficient contact with the State to justify imposition of California's use tax upon approximately $85,000 of products ordered through the mail by California residents. Notably, the *intrastate* business which constituted the constitutional "nexus" to justify taxation was *ten times* the mail order revenue upon which the tax was assessed: in the instant case the intrastate business which the State relies upon to justify the tax is *one tenth* of the interstate business which it seeks to tax. *No appellate court has ever held that a state could constitutionally impose use tax liability on interstate sales which would otherwise be exempt from tax based upon wholly separable intrastate sales of less than one-tenth the amount of the interstate sales.*

This Court relied upon a number of its prior decisions in the use tax area in reaching its decision in *National Geographic*. In each of those cases the facts established a *tangible business relationship* between the in-state activities constituting the "nexus" and the mail order business sought to be taxed.

In *Nelson v. Sears, Roebuck & Co.* (1941) 312 U.S. 359, this Court's decision was based on the obvious relationship between Sears' mail order sales and its sales through its Iowa retail stores which benefitted its mail order business and justified taxation of those sales:

> "Whatever may be the inspiration for these mail orders, however they may be filled, *Iowa may rightly assume that they are not unrelated to respondent's course of business in Iowa.* They are nonetheless a part of that business though none of respondent's agents in Iowa actually solicited or placed them. Hence to include them in the global amount of benefits which respondent is receiving from Iowa business is to conform to *business facts.*" (*Id.* at 364, emphasis added)

Thus, Iowa's use tax on Sears' mail order sales was justified based on a connection or benefit between Sears' mail order business and local retail sales. *The fact that the two aspects of Sears' business were carried on under one corporate umbrella was patently not sufficient to establish that the State of Iowa had the power to tax Sears' mail order sales to its residents.* This Court found it necessary to analyze the *relationship of the interstate and intrastate business* in order to determine whether the State had conferred direct benefits upon Sears' mail order business for which it could justifiably expect a return.

The Stipulation of Facts, as well as the evidence presented at trial, established that *there was no relationship between plaintiff's intrastate and interstate sales.* Moreover, the evidence demonstrated that Board began and *ended* its pre-assessment analysis with the determination that Current's mail order sales and Looart's wholesale sales were made by a single corporate entity. Likewise, the Court of Appeal made no attempt to consider, much less determine, whether there was any connection or rela-

tionship between the two businesses which would constitute a constitutionally permissible taxing "nexus." It has thus ignored the very "business facts" which this Court found to be determinative of the issue of taxing "nexus" with regard to taxation of *inter*state sales.

In *Nelson v. Montgomery Ward* (1941) 312 U.S. 373, a companion case to *Nelson v. Sears, Roebuck & Co.*, the presence of in-state retail stores, operated by the taxpayer, under the *same name*, carrying the *same products* as offered by sale through the mails, demonstrated a tangible connection, so that the State was entitled to assume that the mail order sales were not unrelated to the seller's course of business in the state.

In sharp contrast, it is undisputed that the mail order business of Current was completely separate and independent from the wholesale sales of Looart products in California. The two sides of the business had no common products, employees, advertising or customers. There was no way that a consumer of either product could discern any connection between the two, a situation completely contrary to the cases involving both Sears, Roebuck and Montgomery Ward in which the mail order sales were closely related to and enhanced by the presence of the *retail* sales activities within the state. The same is true with respect to the National Geographic Society; the subject mail order sales were an essential part of that company's business activities.

In *National Geographic*, this Court expressly stated that in order for a use tax to be assessed there had to be "some definite link, some minimum connection" between the State and the taxpayer. (*National Geographic, supra*, 430 U.S. at 561, citing *Miller Bros., supra*, 347 U.S. at 344-345) While this necessary connection need not be proof

that the local business actively assisted the mail order business, in *National Geographic,* as in the *Sears* and *Montgomery Ward* cases, the interrelationship of the mail order sales with the local sales activity, which in all cases consisted of retail sales of the same products, under the same name, which were made from a branch office of the taxpayer, justified the state's assumption that the mail order business was "not unrelated to" the local retail activity. A sufficient "link" or minimum connection between the taxpayer and the state therefore existed. It is that link which is missing here.

In *Felt & Tarrant Co. v. Gallagher* (1939) 306 U.S. 62 and *General Trading Co. v. Tax Comm'n.* (1944) 322 335, the requisite "nexus" was established by the in-state presence of local agents who arranged and therefore facilitated the mail order sales themselves. In the instant case, no one connected with the sale of Looart products in California ever "arranged" or in any other manner facilitated a single sale of Current products.

In *Scripto v. Carson* (1960) 362 U.S. 207, the "nexus" was established by the "10 wholesalers, jobbers, or 'salesmen' conducting continuous local solicitation in Florida and forwarding resulting orders from that State to Atlanta for shipment of the ordered goods." (*Id.* at 211) In *Scripto,* as in all of the other relevant cases, the in-state activity providing the "nexus" was carried on under the name of the corporation, was directly related to, promoted and made possible the very interstate sales which the state sought to tax.

In *National Geographic,* this Court also relied upon *Standard Steel Co. v. Wash. Revenue Dept.* (1975) 419 U.S.

560, in which this Court similarly held that the intrastate presence of an employee of the corporation had a *direct relationship* to the corporation's sales to its Washington customers. Standard had one employee in the State of Washington whose primary responsibility was to consult with one of Standard's Washington-based customers regarding its anticipated needs for Standard's products. In rejecting Standard's argument that its presence in Washington was inconsequential and that "the tax had no reasonable relation to the protection and benefits conferred by the taxing State," *this Court specifically found that Standard's business had enjoyed a valuable benefit from that presence,* since the Washington-based employee:

> "*made possible the realization and continuance of valuable contractual relations* between [the seller and its Washington customer]." (*Id.* at 562, emphasis added)

Thus, in *Standard Steel,* a tangible, perceptible *benefit* was given by the State for which it was entitled to ask return. Moreover, since the tax in issue was a gross receipts tax on Standard's *Washington* business, the price exacted by the state bore a direct and reasonable relation to the profit generated as a result of the Washington contact.

In each of the cases cited in the *National Geographic* opinion this Court determined that the tax assessed bore a direct relationship to the value of the benefits given by the state, that the taxing state had provided privileges, protections or benefits to the foreign corporation doing business within its borders for which the state was entitled to be paid a fair return. In *Complete Auto Transit, Inc. v. Brady* (1977) 430 U.S. 274, the "nexus" was the transportation by motor carrier in Mississippi to Mississippi dealers of cars manufactured outside the state, a vital

aspect of the main buisness of the corporation and one which was essential to its conduct within the State of Mississippi. In *Wisconsin v. J.C. Penney Co.* (1940) 311 U.S. 435, the tax was upon dividend income derived directly from business conducted in Wisconsin. In *Northwestern Cement Co. v. Minn.* (1959) 358 U.S. 450, the out-of-state corporations each had a local office and local salesmen who actively solicited orders for the purchase of products; the tax levied was specifically apportioned to the amount of sales *generated by the in-state activity.* In *General Motors v. Washington* (1965) 377 U.S. 436 the plaintiff had forty employees in the state, as well as offices, and a pattern of regular deliveries of wholesale cars to retailers.

In contrast to each of these decisions is the instant case, in which it is conceded that Current could have conducted its business in exactly the same fashion, made the same number of sales and derived exactly the same profit, if Looart had made no California sales at all during the years in dispute. There is thus no reasonable or causal connection between plaintiff and the State of California by which the State can justify assessment of use taxes upon plaintiff for $7 million of Current's interstate mail order sales.

II.

THE ASSESSMENT OF USE TAXES AGAINST PLAINTIFF FOR CURRENT'S INTERSTATE MAIL ORDER SALES, BASED UPON THE TOTALLY UNRELATED WHOLESALE SALES OF LOOART PRODUCTS, IS UNCONSTITUTIONAL

A.

California's Use Tax, As Applied To Plaintiff, Must Be "Fairly Related" To Services Provided

The law is unequivocal that sales made solely through means of interstate commerce may not be subject to state

sales or use tax solely because such sales receive incidental benefits from the state. (*National Bellas Hess, supra,* 386 U.S. 753). Plaintiff asserts that in addition to the lack of taxable "nexus" in the instant case, the subject tax is improper as not "fairly related" to any benefits or protections which the State of California has provided to plaintiff. As a result, it is repugnant to the well-recognized principle that "[s]tate taxation falling on interstate commerce . . . can only be justified as designed to make such commerce *bear a fair share of the cost of the local government whose protection it enjoys.*" (*Freeman v. Hewit* (1946) 329 U.S. 249, 253, emphasis added)

This Court set forth a four-prong test to determine the constitutional validity of state taxes on interstate commerce: (1) the tax must apply to an activity with a substantial "nexus" with the taxing state; (2) the tax must be fairly apportioned; (3) it must not discriminate against interstate commerce; and (4) it must be *fairly related* to the services provided. (*Complete Auto Transit, supra.* 430 U.S. at 279, emphasis added; see also, *Commonwealth Edison Co. v. Montana* (1981) 453 U.S. 609, 617) Due process requires " 'a rational relationship between the income attributed to the state and the intrastate values of the enterprise . . .;' [t]he tax cannot be 'out of all appropriate proportion to the business transacted by the appellant in that State.' " (*Exxon Corp. v. Wisconsin Dept. of Revenue* (1980) 447 U.S. 207, 219-220, citing *Mobil Oil Corp. v. Commissioner of Taxes* (1980) 445 U.S. 425, 436-437 and *Hans Rees' Sons v. No. Carolina* (1931) 283 U.S. 123, 135)

This "fair relationship" requirement, like the "nexus" requirement, arises from the Due Process clause of the

Fourteenth Amendment. It mandates that a State have a sufficient relationship with the taxed activity to justify requiring that activity to help support the cost of government through taxes. "[T]he taxing power exerted by the state [must bear a] fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return." (*Wisconsin v. J.C. Penney Co., supra,* 311 U.S. at 444; see also, *Commonwealth Edison Co. v. Montana, supra,* 453 U.S. at 625; *General Motors v. Washington, supra,* 377 U.S. at 440-441)

B.

The Assessment Of Use Taxes Against Plaintiff Bears No Relationship To The Services Provided Plaintiff By The State of California

The Stipulation of Facts herein establishes that: (1) the intrastate business of Looart products totaled approximately $760,000 during the taxable years in issue, whereas the solely interstate mail order sales of Current products which have been subject to tax were *ten times* that amount, (*i.e.,* were in excess of $7 million during the same period of time); (2) the business of Current and Looart were at all times operated separately and independently; (3) Current had *no* physical connection with California; (4) the manufacture of the Current products took place exclusively in Colorado and these products were advertised and sold exclusively through means of interstate commerce; (5) none of the wholesale sales of Looart products in California in any manner related to or benefitted any sales of Current products; (6) no benefits. services or protections provided indirectly by the State of California to plaintiff were made available to or taken advantage of, in any respect, by Current; and (7) Current's mail order sales would have been

completely immune from California use tax liability were it not for the formalistic corporate merger between Current and Looart.

The only services provided by California that even remotely related to plaintiff were those provided to CPG, an independent California corporation. California has already been compensated for any benefits plaintiff received through its connection with CPG, since it has been paid sales taxes (once Looart products were sold at retail) and income, business and franchise taxes, etc., levied against CPG. Thus, California's attempt to impose any tax collection upon Current's interstate mail order sales business would violate this constitutional "fair relationship" requirement.

While the measure of California's use tax may be fairly related to services provided by California to the in-state consumers of the Current products, on whom the tax is theoretically imposed, there is no such relationship with plaintiff. Furthermore, the fact cannot be ignored that California's use tax, for all practical purposes, is being levied directly upon plaintiff; and more specifically, upon Current's interstate mail order business.

This Court, as well as the California Supreme Court, have long recognized the similarity between use taxes and sales taxes:

> "The *practical and legal effect* of the . . . statute as it has been applied to this . . . vendor *is to make the venfor liable for a use tax due from the purchaser. In economic consequence, it is identical with making him pay a sales tax.*" (*Miller Bros., supra,* 347 U.S. at 344, emphasis added; accord, *Montgomery Ward & Co. v. State Bd. of Equalization* (1969) 272 Cal.App.2d 728, 743, 78 Cal.Rptr. 373, cert. denied *State Board of Equalization of State of California v. Montgomery Ward & Co.* (1970) 396 U.S. 1040)

It is well established that the California sales tax is a tax "imposed on all retailers" (Cal. Rev. & Tax. Code § 6051):

> "The cases definitely establish that the Retail Sales Tax Act of California imposes [a] . . . tax on the retailer and not on the consumer. . . . [T]he question is no longer an open one." (*De Aryan v. Akers* (1939) 12 Cal.2d 781, 783, 87 P.2d 695, cert. denied *Aryan v. Akers* (1939) 308 U.S. 581)

Thus, the practical effect of Board's assessment of the use taxes at issue is to require *plaintiff* to pay $454,387.93 in taxes on the interstate mail order sales by Current in California from January 1, 1972 through April 30, 1976, based solely upon plaintiff's wholesale sales through CPG. Notably, in making this determination of whether the subject tax is "fairly related" to any services provided by California, it cannot be overlooked that the amount of the tax is almost two-thirds of all of the gross sales of Looart during the same years (i.e., approximately $760,000). Since it is conceded that Current's mail order sales in California were conducted without any assistance from or relation to California during the 17 years prior to the 1967 merger, and that they continued to be conducted in the same fashion—*i.e.*, exclusively through means of interstate commerce—the only privileges, benefits or protections which California did or could have extended to plaintiff after the merger would have been through the State's connection with CPG.

Plaintiff submits that there is thus no reasonable basis upon which Board, or this Court, can conclude that it is appropriate to assess *any* tax upon plaintiff for Current's mail order sales, much less one that is two-thirds as great as the *gross sales* generated by the California activities which purportedly justifies the tax. To maintain that such a tax is in "fair relation" to any benefits provided by California to plaintiff is beyond all bounds

of reasonability. The imposition of the subject tax clearly constitutes a violation of plaintiff's due process rights, as well as an inequitable and impermissible burden upon interstate commerce.

—o—

CONCLUSION

The Court of Appeal, in reversing the trial court below, has patently disregarded the long line of decisions of this Court regarding due process limitations on the right of a state to impose use taxes on an out-of-state mail order vendor. The "slightest presence" standard of constitutional "nexus" adopted by the California court patently conflicts with the controlling law on this issue.

The evidence established that plaintiff's only contact with the State was its sale at wholesale of Looart products, through an independent California corporation, to retail stores in California; sales tax was paid on all of those sales. The sales of Looart products were entirely unrelated to the mail order sales of Current upon which the state seeks to impose the subject tax. Current products were different than those of Looart; they were sold solely under the Current name, to a different market and without any reference to, relationship to, or benefit from the wholesale sales of Looart products. The evidence established that the intrastate sales did not affect or benefit the interstate sales in any respect.

The trial court carefully weighed the evidence before it and correctly determined by examining all of the facts and circumstances of plaintiff's relationship with the State of California, that plaintiff did not have a *sufficient* connection with the State to justify the imposition of more than $450,000 in use taxes on Current's mail order sales.

The Court of Appeal peremptorily and summarily reversed the judgment of the trial court. It did not, as constitutionally required, examine the extent and nature of plaintiff's contacts with the state; nor did it apply the proper constitutional standard to determine whether plaintiff's connection with the state was "substantial." There is thus no cognizable basis for the Court of Appeal's reversal of the judgment of the trial court; its conclusion that the requisite "nexus" did exist between California and plaintiff is patently in error. No appellate decision has ever sanctioned the imposition of a use tax upon an out-of-state vendor based upon contacts between the taxpayer and the taxing state as unrelated and as nominal as were established in the instant case.

Plaintiff therefore submits that it is entitled to the proper application of due process as mandated under the United States Constitution and controlling decisions of this Court in interpretation thereof, and respectfully requests that the decision of the Court of Appeal be reversed and the judgment of the trial court, ordering refund of the use taxes assessed against it, be reinstated.

DATED: October 29, 1986.

Respectfully submitted,

BANCROFT, AVERY & MCALISTER

BY: /s/ LEWIS WARREN
Attorneys for Plaintiff and Respondent Looart Press, Inc.

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ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

1st District, Division 4, No. A025677

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

———o———

LOOART PRESS, INC.,

Respondent,

v.

STATE BOARD OF EQUALIZATION,

Appellant.

———o———

(Filed July 30, 1986)

Respondent's petition for review DENIED.

Bird, C.J., is of the opinion the petition should be granted.

BIRD
Chief Justice

COURT OF APPEAL OF THE STATE
OF CALIFORNIA

IN AND FOR THE
FIRST APPELLATE DISTRICT

DIVISION: 4

LOOART PRESS, INC.

vs.

CALIFORNIA STATE BOARD OF EQUALIZATION

A025677

San Francisco County No. 773804

(Filed May 12, 1986)

BY THE COURT:

The petition for rehearing is denied.

Dated: MAY 12, 1986

ANDERSON, P.J.

NOT TO BE PUBLISHED
IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION FOUR

LOOART PRESS, INC.

Plaintiff and Respondent,

v.

STATE BOARD OF EQUALIZATION,

Defendant and Appellant.

A025677
(Super. Ct. No. 773804)

(Filed April 16, 1986)

Respondent Looart Press, Inc. brought suit against appellant State Board of Equalization to obtain a refund of use taxes paid under protest on behalf of its Current division. (Rev. & Tax Code, § 6933.)[1] Sitting without a jury, the trial court found for the taxpayer and ordered the Board to issue a refund. The Board appeals, contending that Looart Press, Inc. had a sufficient nexus with California to justify collection of use taxes due from some of the corporation's Current division California sales. We agree and reverse the judgment.

I. FACTS

The parties stipulated to most of the facts. In 1967, two Colorado corporations, Looart Press, Inc. and Current, Inc., merged into one company operating under the

1. All statutory references are to the Revenue and Taxation Code.

name of respondent Looart Press, Inc. (LPI). The two divisions operated independently. The Looart division was engaged in the business of designing, manufacturing, and wholesaling Christmas cards to retail stores. The retail stores were responsible for paying all sales taxes for these products. The Current division was engaged in the business of designing, manufacturing, and selling stationery products advertised and sold by mail through interstate commerce.

By contractual agreement the Looart division products were marketed in California through Christmas Publishers Group (CPG). The contract gave CPG the right to be the sole representative for Looart division products in this state. CPG maintained some Looart division stock in its warehouse to allow it to fill orders quickly and billed retail outlets under LPI's name; the bills requested payment to be made to LPI in Colorado. The Looart division also advertised that it had a "fulfillment center" in California, again CPG. CPG did not handle any Current division products, nor did it participate in any way with the Current division operations.

The Board of Equalization audited LPI's books and determined that use tax should be collected for the tax period from January 1, 1972 through April 30, 1976. Based on the results of an LPI survey of its Current division customers, the Board determined that LPI owed use taxes on all but 12 percent of the Current division's California sales. After the Board notified LPI of its tax obligation, LPI paid the tax under protest and filed a claim for refund with the Board. After hearing, the Board rejected

the claim and LPI brought the present action for refund.[2] The trial court ordered the Board to make restitution to LPI, granting LPI's suit for refund. The parties did not request a statement of decision. The Board filed a timely appeal from the judgment.

II. DISCUSSION

Every retailer engaged in business in this state and making sales of tangible personal property for storage, use, or other consumption in this state must collect use tax from the purchaser. (§ 6203.) The state must establish a sufficient nexus between the taxpayer and the state before it may collect this tax. (See *Nat. Bellas Hess v. Dept. of Revenue* (1967) 386 U.S. 753, 756.) The Board contends that LPI's *Looart* division activities within this state established the requisite nexus to allow it to constitutionally collect use taxes on the California sales of the Current division.[3] LPI disagrees, contending that the trial court's implied conclusion—that the state must have some relationship with the *Current* division in order to tax its sales—is correct. This question—whether the state's nexus must be with the activities of the Current division or whether it is sufficient if the state is connected with any part of LPI's operations—forms the pivotal issue on appeal.

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2. The parties stipulated that LPI exhausted its administrative remedies before bringing its suit for refund. The Board does not challenge this matter on appeal.

3. "A use tax ordinarily serves to complement the sales tax by eliminating the incentive to make major purchases in States with lower sales taxes; it requires the resident who shops out-of-state to pay a use tax equal to the sales tax savings." (*Minneapolis Star v. Minnesota Comm'r of Rev.* (1983) 460 U.S. 575, 581-582.)

In *National Geographic v. Cal. Equalization Bd.* (1977) 430 U.S. 551, the United States Supreme Court considered this precise question: "whether the [National Geographic] Society's activities at [its advertising] offices in California provide sufficient nexus between the out-of-state seller . . . and the State—as required by the Due Process Clause of the Fourteenth Amendment and the Commerce Clause—to support the imposition upon the Society of a [use tax] pursuant to §§ 6203 and 6204, measured by the . . . mail-order sales of merchandise [ordered] from [offices outside California]." (*Id.*, at p. 554.) Finding a sufficient nexus to impose the use tax, the court also rejected the taxpayer's claim that because its contacts with California customers were related only to its mail-order sales and its California offices played no part in those sales, the nexus was too tenuous to support taxation. (*Id.*, at pp. 560-562.) "[T]he fact [that the] business was departmentalized—the mail-order and [other] operations were separately administered—[does] not preclude the finding of sufficient nexus." (*Id.*, at p. 560.) "[T]he relevant constitutional test to establish the requisite nexus for requiring an out-of-state seller to collect and pay the use tax is not whether the duty to collect the use tax relates to the seller's activities carried on within the State, but simply whether the facts demonstrate 'some definite link, some minimum connection, between [the State and] the *person* . . . it seeks to tax.'" (*Id.*, at p. 561 [emphasis in original].)

In the present case, the Board established a sufficient nexus between LPI and the state when it established LPI's connection with its agent, CPG (see *Illinois Commercial Men's Assn. v. State Bd. of Equalization* (1983) 34 Cal.

3d 839, 844, 849-850, app. dism., — U.S. —, 80 L.Ed.2d 452, 104 S.Ct. 1901 [agents, independent contractors constitute sufficient nexus for tax purposes]; see also *Scripto v. Carson* (1960) 362 U.S. 207, 211 [fact that in-state operatives are not employees or full-time operatives for taxpayer is "a fine distinction . . . without constitutional significance"; to permit formal distinctions to make a constitutional difference "would open the gates to a stampede of tax avoidance"].) Under *National Geographic v. Cal. Equalization Bd., supra,* 430 U.S. 551, the fact that the Looart and Current divisions are separately administered is irrelevant; the issue is whether there is a sufficient nexus between *any* part of LPI and the state. (*Id.*, at pp. 560-561.) "It is well established that corporate status will not be disregarded to facilitate tax avoidance." (*Western States Bankcard Assn. v. City and County of San Francisco* (1977) 19 Cal.3d 208, 219.) The taxpayer having chosen to conduct its business under a particular arrangement cannot disregard it when it would be to the taxpayer's advantage. (*Cal-Metal Corp. v. State Bd. of Equalization* (1984) 161 Cal.App.3d 759, 766; see *Mercedes-Benz v. State Bd. of Equalization* (1982) 127 Cal.App.3d 871, 874 [if taxpayer elects to conduct its business in a particular manner, "it must also suffer whatever disadvantages attach to that election"]; see also § 6005 [including "corporation" within the definition of "person"].) The Board having a sufficient nexus with the corporation, it may constitutionally require LPI to collect use taxes on its Current division sales to California customers, even though LPI's in-state activities are solely related to the wholesale activities of its Looart division. (See *National Geographie v. Cal. Equalization Bd., supra,* 430 U.S. at pp. 554, 560-

561; see also *Neogard Corp. v. Malott & Peterson-Grundy* (1980) 106 Cal.App.3d 213, 219.)[4] The trial court's implied finding that the state was required to establish a nexus between the Current division and the state was incorrect; thus, the cause must be remanded. On retrial, the trial court must consider all LPI sales, from both the Looart and Current divisions, when setting the tax that LPI owes.[5]

The judgment is reversed and the cause is remanded.

Channell, J.

We concur:

Anderson, P.J.

Poche, J.

4. LPI cites the substantial evidence test as the proper inquiry for this appeal. However, the parties stipulated to the underlying facts at trial; we perceive no disagreements between them about any material fact that would require us to apply the substantial evidence test. The issue on appeal is a purely legal one (see *L.A. Teachers Union v. L.A. City Bd. of Ed.* (1969) 71 Cal.2d 551, 556; *Matossian v. Fahmie* (1980) 101 Cal.App.3d 128, 135) on which this court must exercise its independent judgment (see *Communications Satellite Corp. v. Franchise tax Bd.* (1984) 156 Cal.App.3d 726, 746-747, app. dism., — U.S. —, 84 L.Ed.2d 311, 105 S.Ct. 1158): whether, under the stipulated facts, the state has established a sufficient nexus with LPI to entitle it to constitutionally collect use taxes for the California sales of the Current division. (See *National Geographic v. Cal. Equalization Bd., supra,* 430 U.S. at p. 561.)

5. The judgment must be reversed and the trial court must conduct a new trial to determine the accuracy of the amount of the tax paid; thus, we need not resolve the other points raised on appeal.

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SUPERIOR COURT, STATE OF CALIFORNIA
FOR THE CITY AND COUNTY OF SAN FRANCISCO

LOOART PRESS, INC., Plaintiff,	NO. 773804
CALIFORNIA STATE BOARD OF EQUALIZATION, Defendant.	JUDGMENT (Filed November 23, 1983)

This action was tried before the Honorable John Dearman, sitting without a jury, a jury having been waived by all parties. Plaintiff appeared through its counsel, Bancroft, Avery & McAlister by Sandra J. Shapiro and Michele R. McNellis; defendant appeared through its counsel, the Attorney General of the State of California by Patricia Streloff, Deputy Attorney General.

Oral and documentary evidence were introduced, together with written stipulated facts, written trial briefs were filed and the matter was then submitted. The Court filed its Notice of Tentative Decision on October 24, 1983. No Statement of Decision was requested.

IT IS HEREBY ORDERED AND ADJUDGED AS FOLLOWS:

1. Plaintiff shall recover from defendant State Board of Equalization the sums paid by plaintiff under protest, to wit: the sum of $454,387.93.

2. Plaintiff shall further recover from defendant interest upon the aforesaid sums in the sum of $328,382.21 to the date of entry of judgment.

3. Plaintiff shall recover from defendant its costs of suit in the sum of $ Actual.

DATED: NOV. 22, 1983

JOHN DEARMAN
Judge of the Superior Court

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SUPERIOR COURT, STATE OF CALIFORNIA

FOR THE CITY AND COUNTY OF SAN FRANCISCO

LOOART PRESS, INC., Plaintiff,	No. 773804
vs.	STIPULATION OF FACTS
CALIFORNIA STATE BOARD OF EQUALIZATION, Defendant.	(Filed August 2, 1983)

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto by their respective counsel that for the purpose of the trial of the above-entitled case the following facts shall be taken as true and correct and shall be treated as facts proven in open court. This stipulation shall not be construed as a concession by either party of the relevancy or materiality or admissibility of any of the facts stipulated herein and the parties expressly reserve the right to argue the relevancy, materiality or admissibility of any of the facts stipulated herein to be true.

It is further stipulated and agreed that any exhibits attached hereto are included for the limited purpose of

showing the contents thereof and not for the truth of the matters stated therein. However, either party may offer any of such documents for additional purposes subject to objections as to competency, relevancy, materiality and admissibility, but not subject to the best evidence objection or any objection as to the genuineness of due execution thereof.

The parties reserve the right to amend this stipulation of facts by further additional stipulations. In addition, the parties hereto agree that each of them may on trial of this cause call witnesses and offer proof for the purpose of proving such additional facts not inconsistent with the facts stipulated herein as each party may see fit.

Unless otherwise indicated, all facts stipulated to herein relate to the period January 1, 1972 to April 30, 1976.

A.

General Background

1. The State Board of Equalization ("Board") is the agency of the State of California charged by law with the duty of administering the Sales and Use Tax Law (Cal. Rev. & Tax Code § 6001 *et seq.*).

2. Looart Press, Inc. (plaintiff) was, at all times relevant hereto, a corporation organized and existing under the laws of Colorado with its principal place of business located in Colorado Springs, Colorado. Looart was incorporated on July 31, 1950. Attached hereto as Exhibit A is a true and correct copy of Looart's Articles of Incorporation.

3. Current, Inc. was incorporated under the laws of Colorado on November 1, 1960. During its existence its sole place of business was at all times located in Colorado Springs, Colorado. From 1950-1960, prior to its incorporation, Current, Inc. had operated under the name "Current." Attached hereto as Exhibit B is a true and correct copy of Current's Articles of Incorporation.

4. For the 17 years between 1950 and 1967, the businesses of "Current" and "Looart" operated completely separately and independently.

5. In 1967 Current, Inc. merged with Looart Press, Inc. (the "merger"); the surviving company operated under the name Looart Press, Inc. Attached hereto as Exhibit C is a true and correct copy of the Articles of Merger.

B.

The Relationship Between Products Sold Under The Name "Current, Inc." And These Sold Under The Name "Looart Press, Inc."

6. From its inception in 1950 through its incorporation in 1960 and its merger with Looart Press, Inc. in 1967, the "Current" business consisted exclusively of the design, manufacture and sale of moderately priced stationery products which were advertised and sold exclusively through means of interstate commerce.

7. From the incorporation of Looart Press, Inc. in 1950 through 1976, the principal business conducted in the name of "Looart Press, Inc." consisted of the design, manufacture and sale of relatively high-priced, custom-designed Christmas cards that were distributed under the

brand names "Looart" and "Holly Tree." The cards were sold solely at wholesale to retail department and stationery stores; the stores then resold them, either as personalized cards selected by the customer from albums or as boxed custom-type cards. The only other business activity conducted under the "Looart Press, Inc." name was the manufacture of custom wedding announcements which it marketed solely on a wholesale basis to stationery stores which resold to retail customers. It was the responsibility of the retailers of the "Looart" line of products to pay to the State of California all sales taxes relating to their sales.

8. At all times subsequent to the merger of Current, Inc. and Looart Press, Inc. the products which Current, Inc. had formerly advertised and sold under the name "Current, Inc." (and, prior to that, "Current") continued to be advertised and sold exclusively through means of interstate commerce, and continued to bear the name "Current, Inc."

9. At all times subsequent to the merger, the employees who had worked for Current, Inc. prior to the merger continued to be engaged solely in the manufacture, marketing and sale of products sold under the name "Current, Inc." Although their employer after the merger became Looart Press, Inc., the former employees of Current continued to perform their duties, in all material respects, as if the merger had never occurred.

10. Similarly, at all times subsequent to the merger the employees who had worked for Looart Press, Inc. prior to the merger continued to be engaged solely in the manufacture, marketing and sale of the type of products which

Looart had manufactured and sold prior to its merger with Current, Inc. Thus, after the merger the employees of Looart Press, Inc. who had worked for Looart Press, Inc. prior to the merger continued their duties, in all material respects, as if the merger had never occurred.

11. At all times subsequent to the merger, the books and records regarding the accounts receivable and the expense accounts relating to the "Current, Inc." line of products were maintained separately and independently from the books and records regarding the accounts receivable and expense accounts relating to the line of products marketed under the name "Looart Press, Inc."

12. At all times subsequent to the merger, the sequence numbers used on the "Current, Inc." line of products were entirely separate from the sequence numbers used in connection with products marketed under the "Looart" name. Similarly, inventories relating to "Current" products were created and maintained separately and independently from the inventories relating to "Looart" products.

13. At all times subsequent to the merger, the budgets for the production and sale of the "Current, Inc." line of products were maintained separately and independently from the budgets which governed the production and sale of the "Looart" line of products.

14. At all times subsequent to the merger, separate letterhead stationery was used for the respective businesses conducted under the names "Current, Inc." and "Looart Press, Inc." Correspondence relating to the "Current, Inc." line of products was conducted on staticnery which bore the name "Current, Inc." Correspondence re-

lating to the "Looart" line of products was conducted on stationery which bore the name "Looart Press, Inc."

Neither the "Current" nor the "Looart" stationery made any reference, or in any way indicated that there was any connection with the other.

15. At all times subsequent to the merger, there were totally separate customer service departments for the "Looart" and "Current" products. Complaints or inquiries from mail order customers would be handled by employees who worked exclusively with "Current" products, and complaints or inquiries relating to "Looart" products would be handled by employees who worked only with "Looart" products.

16. At all times subsequent to the merger the accounts receivable departments for "Current" and "Looart" products were maintained completely separate and were staffed by employees who worked either exclusively on "Current" sales or exclusively on "Looart" sales. If a purchaser of a "Current, Inc." product was entitled to a refund, he or she would receive a check bearing the name "Current, Inc." If a retailer of "Looart" products was entitled to a refund, it would receive a check bearing the name "Looart Press, Inc."

17. At all times subsequent to the merger the "Current, Inc." line of products continued to be advertised, manufactured and sold solely under the name "Current, Inc." and no attempt was ever made to associate the "Looart Press" Christmas card and wedding invitation lines with the mail order stationery items sold under the name "Current, Inc."

18. None of the mail order products sold through the mails under the name "Current, Inc." ever bore the name "Looart Press, Inc."

19. None of the Christmas cards or wedding invitations sold under the name "Looart Press, Inc." ever bore the name "Current, Inc."

20. None of the advertising done to promote the sale of the "Looart" Christmas card or wedding invitation lines ever indicated that said lines were manufactured by the same corporation which manufactured products sold through the mails under the name "Current, Inc."

21. None of the advertising done to promote the sale of products marketed under the name "Current, Inc." ever indicated that those products were manufactured by the same corporation which manufactured products under the name "Looart Press, Inc."

22. The Looart line of Christmas cards were of a substantially higher quality and were marketed at a substantially higher price than any of the cards or other stationery items sold through the mails under the name "Current, Inc."

23. The designs used for "Current" and "Looart" lines of Christmas cards never coincided; each line of cards had its own, separate designs.

24. The market to which the "Current, Inc." line of products was directed was generally considered to be different from the market which the "Looart" line of Christmas cards served. Christmas cards sold under the "Looart" name were intended to be marketed to persons of higher levels of income and were sold through sta-

tionery stores and retailers such as I. Magnin's, Bullocks, Macy's and Marshall Field.

25. There was never any attempt made to develop retail establishments as a potential market for "Current, Inc." products.

26. The line of products manufactured and sold under the name "Current, Inc." was directed exclusively to mail order buyers.

27. The list of potential customers to whom the "Current, Inc." catalogues were sent was compiled from lists of customers who had purchased "Current, Inc." products in prior years and from customer lists rented from other mail order companies. At no time was there any attempt made to identify individuals who had purchased Christmas cards or wedding invitations sold under the "Looart" name in order to include their names on "Current, Inc.'s" list of mail order customers.

28. None of the "Current, Inc." catalogues advertising the sale of those products through the mails were ever sent to customers whose names had been derived as a result of sales of cards under the "Looart" name.

29. There is no evidence which indicates that after the merger a consumer of either line of products could determine, by inspection of the products or the advertising relating thereto, that there was any connection between the Christmas and wedding card lines which bore the "Looart" brand names and the mail order stationery items which bore the name "Current, Inc."

30. The "Current, Inc." mail order business in California was unrelated to and was not promoted or benefitted by any sales of "Looart" products in California.

31. The marketing of the "Looart" line of products was completely separate from the marketing of the "Current" line of products; there was no cross-over of employees, products, ideas, advertising, or marketing techniques.

32. The mail order sales of the "Current, Inc." line of products into California for the years in question exceeded approximately tenfold the volume of wholesale sales of products under the name "Looart."

C.

California-Related Activities Regarding The Sale Of Products Under The Name "Looart Press, Inc."

33. Looart Press, Inc. applied for a California seller's permit in December 1968. Attached hereto as Exhibit D is a true and correct copy of the letter to the Board which accompanied Looart's application. On the basis of this letter, the starting date of Looart's permit was made retroactive to July 1, 1956.

34. The "Looart" Christmas cards were marketed in California through Christmas Publishers Group ("CPG"), a California corporation apparently owned by one Bernard Bader. Prior to Spring of 1974, the principal office of CPG was located at 1057 Detroit Avenue, Concord; thereafter, the principal office was located at 965 Detroit Avenue, Concord. At all times relevant hereto, CPG's mailing address was a box number in Walnut Creek, California.

35. CPG distributed "Looart" albums and cards to department and stationery stores; CPG also distributed albums and cards of other manufacturers. It was the re-

sponsibility of the stationery and department stores which sold the "Looart" products to pay to the State of California all sales taxes relating to those retail sales. Plaintiff did not make any retail sales of "Looart" products in California during the years in issue.[1]

36. At no time did Bernard Bader, individually, or CPG, have any involvement in the manufacture or marketing of any products sold under the name "Current, Inc."

37. For a number of years prior to 1972, CPG had sold and distributed products under the name "Looart" in California under an oral agreement. On June 20, 1972, it entered into a written agreement with plaintiff. A true and correct copy of said contract is attached hereto as Exhibit E. All contractual relations between plaintiff and CPG were discontinued after 1976.

38. Under the 1972 contract, CPG agreed to promote and sell products sold under the "Looart" name through established retail department, stationery and gift stores, and through any other retail outlets agreed upon by both parties in writing. It also agreed to imprint customers' names, as requested, on the cards sold through CPG. Plaintiff, in turn, granted CPG the right to be the sole California representative for the sale of products under the "Looart" name to retail outlets, and the sole right to promote, sell and distribute "Looart" products through

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[1] A sampling done by the State Board indicated that in 1975 CPG sold $175 of "Looart" cards at retail without plaintiff's authorization. Defendant acknowledges that those sales are irrelevant to the determination of the propriety of the tax assessment at issue in this action.

such outlets. CPG's agreement related solely to "Looart" products; it bore no relation whatsoever to the marketing or sale of the "Current, Inc." line of products with which CPG never had any connection.

39. Plaintiff sent display albums of sample personalized "Looart" cards to CPG by common carrier. CPG personalized the cards by imprinting them with sample names and placed the personalized cards in the display albums. The albums were then shipped to retail outlets in containers supplied or paid for by the "Looart" side of plaintiff's business. For such services in completing a display album of 75 or fewer cards, plaintiff agreed to pay CPG at the rate of $1.00 per album. It also agreed to pay the actual cost of shipment to the retail outlet.

40. Plaintiff's contract with CPG did not provide for or make available to the "Current, Inc." mail order business any rights, benefits or services which were or could have been used to enhance, support or promote any aspect of the mail order business of "Current, Inc."

41. Pursuant to the terms of its agreement with plaintiff, CPG maintained an inventory of "Looart" products at its Concord place of business during the Christmas season. This inventory included both cards shown in the display albums and solid-pack Christmas cards (i.e., boxed cards which were not personalized). Inventory was used to fill orders within a short period of time. Those orders which could not be accommodated from the inventory were sent to Colorado Springs.

42. Suggested retail prices for "Looart" products were determined at annual meetings held in Colorado Springs, Colorado, which were attended by Bernard Bader

and representatives of Looart Press, Inc. who were engaged exclusively in the manufacture and sale of products under the "Looart" name. These suggested prices were shown in the "Looart" catalogues.

43. Generally, sales of "Looart" products were handled as follows:

a. Customers of the retail outlet placed orders for the cards with or without imprinting;

b. Orders were sent to CPG, which imprinted the cards with the customer's name, if requested;

c. The cards were delivered by mail or common carrier to the retail outlet, which then delivered the cards to the consumer.

44. At the time an order was delivered, CPG billed the retail outlet on a form supplied by plaintiff and bearing the "Looart" name. The bill requested that full payment be made to the order of "Looart Press, Inc." in Colorado. On a monthly basis plaintiff would send CPG its agreed share of the sale proceeds, plus other costs which had been billed to plaintiff by CPG.

45. CPG received as payment for its sales of "Looart" products an amount equal to 25 percent of net sales derived from the personalized Christmas catalogues or albums; 20 percent of net sales of boxed and/or solid pack cards; and 33⅓ percent of net sales of "carryover merchandise"—*i.e.*, Christmas cards supplied by plaintiff to CPG and remaining on hand at the end of the Christmas season. CPG sold carryover merchandise at close-out sales. It was not charged for any carryover merchandise which it was unable to sell.

46. Plaintiff agreed to reimburse CPG for all costs in connection with special imprinting and to pay 50 percent of net sales to CPG whenever more than one line of printing was required on a "Looart" product or printing was required on envelopes accompanying a "Looart" product.

47. CPG selected the retailers through which the "Looart" products would be marketed. Although plaintiff retained, by contract, the right to accept or reject customers, plaintiff often did not know who CPG had selected as a retailer, and, moreover, never did, in fact, reject any retailer selected by CPG.

48. CPG agreed to assist plaintiff in the collection of delinquent accounts. Plaintiff, in turn, agreed to reimburse CPG for any costs incurred in its collection efforts. In instances where retail outlets failed to make payments to plaintiff, CPG nevertheless received its agreed portion of the net sales of "Looart" products through CPG.

49. CPG agreed to pay all costs and expenses for the clerical processing of orders and merchandise to the trade. CPG also was to furnish the shipping materials, but plaintiff agreed to reimburse CPG for the actual cost of all shipping charges.

50. Plaintiff insured all the "Looart" products in transit to or from CPG and all products on hand with CPG.

51. Sales of "Looart" products in California during the tax period totaled approximately $763,632. Mail order sales of "Current, Inc." products during the same period totaled approximately $7,007,138.

52. Attached hereto as Exhibit F is a true and correct copy of a letter sent to the Board by Bernard Bader on January 5, 1976.

D.

The Interstate Sales Activities Carried On Under the Name "Current, Inc."

53. During the tax period, the mail order business of "Current, Inc." products had two seasons: Spring and Fall. Each season, catalogues with order forms were mailed to former and potential customers whose names were obtained from a list of prior purchasers of "Current, Inc." products and rented mail order lists. A copy of a typical catalogue is attached hereto as Exhibit G.

54. Items sold under the brand name of "Current, Inc." were advertised in magazines distributed in California and by direct mailing, but plaintiff had no other contact with the state with respect to the "Current, Inc." line. Orders for the "Current" items were sent by mail to plaintiff's Colorado headquarters and the items sold were mailed directly to the customers from the same Colorado facility.

55. Much of the "Current, Inc." advertising was aimed at organizations seeking to raise funds, which could order large quantities at reduced prices offered by plaintiff and resell the items at higher single unit prices.

56. A box of "Current, Inc." products generally consisted of a unit of 12 or more cards or stationery items. Prior to the Fall 1975 sales season, the purchase price per unit for less than a six-unit order was the listed catalogue price. An order consisting of six or more units was sold

at a discount of up to 45 percent. Commencing with the Fall 1975 sales season, sales of less than eight units were sold at the "Catalogue Price." An order of 8 to 15 units was sold at a "Quantity Price" (generally a discount of 25 percent), and an order of 16 or more units was sold at a "Fund-Raiser Price" (generally a discount of 45 percent).

57. The new discount price structure adopted in 1975 for the "Current, Inc." products was based on market research and was intended to encourage high volume sales. Prior to 1975, orders above 15 units accounted for approximately 65 percent of plaintiff's dollar sales. Plaintiff's accounting analyses determined that "Current" orders below 16 units per customer were marginally profitable and orders below 6 units per customer (5 to 10 percent of dollar volume) were sold at a loss after taking into account the cost of mailing and postage. Sales at a loss were continued as a form of advertising and to encourage future volume sales.

58. Statistics under the Fall 1975 discount structure indicated the following with regard to orders for the Fall of 1975:

	Units Sold Per Order			
	Total		1-7	
	$/#	%	$/#	%
Orders Received	775,124	100	195,845	25.3
Units Sold (000's)	15,205.7	100	715.7	4.7
Dollar Sales (000's)	$11,867.6	100	$843.2	7.1

	Units Sold Per Order			
	8-15		16+	
	$/#	%	$/#	%
Orders Received	192,606	24.8	386,673	49.9
Units Sold (000's)	2,006.4	13.2	12,483.6	82.1
Dollar Sales (000's)	$1,759.5	14.8	$9,264.9	78.1

59. The annual dollar sales of Looart Press, Inc. Christmas cards made in California through CPG in the years in question was:

1972	173,241
1973	166,206
1974	184,550
1975	239,635

60. The average dollar amount of orders for the "Current, Inc." products during the 1972-1975 period was as follows:

	Spring	*Fall*
1972	$10.68	$12.21
1973	$10.04	$12.15
1974	$10.80	$12.59
1975	$10.07	$15.29

61. Mail order sales volume of "Current, Inc." products in California during the years in question was as follows:

Year	*Dollar Sales*	*No. of Orders*
1972	$1,009,367	96,535
1973	1,242,924	140,451
1974	1,785,342	188,160
1975	2,295,806	217,169
1976 (to April 30)	673,699	62,965
TOTAL	$7,007,138	705,280

E.

The Audit

62. Plaintiff did not collect sales or use tax on any mail order sales sent to California during the tax period.

63. The State Board of Equalization caused an audit to be made of Looart's books for the period January 1, 1972 through April 30, 1976. It was determined by the auditor that Looart was required to collect use tax on

mail order sales to California customers who did not purchase "Current, Inc." products for resale.

64. The State Board of Equalization concedes that if the business activities relating to the "Current" and "Looart" lines of products had been exactly the same as they were for the tax years in issue (1972-1976), but the 1967 merger between Current, Inc. and Looart Press, Inc. had not occurred, so that those business activities had been conducted by two corporate entities, rather than one, the applicable statutes relied upon by the Board in assessing the subject use taxes, would not have required the collection of use taxes on the mail order sales of "Current, Inc." products during the years in issue.

65. While the audit was pending, plaintiff conducted a survey of the mail order customers of "Current, Inc." products to ascertain how many of them were buying products for resale. Every 35th customer in 1975 was contacted by mail and requested to state whether the purchase was for personal use or for resale. A true and correct copy of the questionnaire used by Looart is attached hereto as Exhibit H.

66. The names and addresses used in the survey were selected from a randomly ordered list of names and addresses maintained in the regular course of business by recording each order received on a chronological basis.

67. Prior to commencing the survey, plaintiff provided the State Board of Equalization with a copy of the questionnaire it proposed to send to a random selection of "Current, Inc." customers. Plaintiff also advised the State Board of the method it intended to use in order to obtain a random list of "Current, Inc." customers to

which the questionnaire would be sent. The State Board approved the form of the questionnaire which was eventually used and also approved the method by which plaintiff selected the random list of customers to whom the questionnaire was sent.

68. Responses to the Looart questionnaire were received from 58 percent of the customers contacted. On the basis of these responses, plaintiff determined that purchases fell into one of three categories: purchases for personal use, group purchases (*i.e.*, combined purchases by several persons pooling their orders to obtain the benefit of the lower price for quantity purchases) and purchases for resale. Plaintiff then tabulated the results of its survey as follows:

Spring 1975	Number of Orders	Dollar	Allctn. of No Respns	Totals After Allctn.	Percent of Dollars: Of Total Sample	Percent of Dollars: By Type Of Sale
Responded:						
Personal Use	1,052	8,363	6,493	14,856	68.18%	69.02%
Group Use	68	1,054	883	1,937	8.89	9.00
Resale	110	2,893	1,837	4,730	21.71	21.98
	1,280	12,310	9,213	21,253	98.78%	100.00%
No Response:	1,014	9,213	(9,213)			
APO's & FPO's	10	204		204	.94	
Error/ Omission	6	63		63	.28	
Total Sample	2,260	21,790	—o—	21,790	100.00%	

Fall 1975

Responded:						
Personal Use	1,419	17,071	10,079	27,150	61.39%	62.06%
Group Use	145	3,644	2,287	5,931	13.41	13.56
Resale	172	5,136	5,528	10,664	24.11	24.38
	1,736	25,851	17,894	43,745	98.91%	100.00%
No Response:	1,104	17,894	(17,894)			
APO's & FPO's	11	371		371	.84	
Error/ Omission	10	110		110	.25	
Total Sample	2,861	44,226	—o—	44,226	100.0%	

Spring and Fall Combined

Responded:						
Personal Use	2,471	25,433	16,572	42,005	63.63%	64.36%
Group Use	213	4,698	3,170	7,868	11.92	12.05
Resale	282	8,029	7,365	15,394	23.32	23.59
	2,966	38,160	27,107	65,267	98.87%	100.00%
No Response:	2,118	27,107	(27,107)			
APO's & FPO's	21	576		576	.87	
Error/ Omission	16	173		173	.26	
Total Sample	5,121	66,016	—o—	66,016	100.00%	

69. Plaintiff provided the Board with computer print-outs showing the names and addresses of customers contacted in the survey, the dates and amounts of their orders, and plaintiff's classification of their purchases as personal, group or resale purchases. In addition, at the Board's request, plaintiff provided the Board auditor with samples of customer responses relative to group sales and sales for resale. Attached hereto as Exhibit I are copies of documents furnished the auditor with re-

spect to orders for Spring 1975, consisting of pages 3, 8, 10, 17, 20, 24, 28, 33 and 38 of plaintiff's print-out for that period, togecher with copies of the individual responses indicating group sales or sales for resale. Attached hereto as Exhibit J are copies of documents furnished the auditor with respect to orders for Fall 1975, consisting of pages 1, 4, 7, 14, 20, 26, 31, 34, 38, 41 and 46 of plaintiff's print-out for that period, together with copies of the individual responses indicating group sales and sales for resale.

70. The State Board of Equalization did not at that time and does not now dispute either the propriety of the manner in which the survey was conducted, or with one exception, the accuracy of the summaries of the survey responses compiled by plaintiff. The State Board did not accept plaintiff's figure of $8,029 as representing the total dollar value of sales for resale confirmed by the responses to the survey. After reviewing the documents described in the preceding paragraph, the auditor determined that documented sales for resale should have been $7,970.36 out of total California receipts of $66,016.20, which was $58.64 lower than the $8,029 figure obtained by plaintiff. In computing the asserted use tax liability, the auditor then determined that $7,970.36 represented 12.073 percent of $66,016.20. He therefore allowed 12.073 percent of total California sale receipts for the entire tax period in issue as sales for resale based on plaintiff's survey, accepting only those responses to the survey indicating that purchases were for resale. He also treated group sales as sales for personal use rather than as sales for resale. The resulting measure upon which the use tax liability on unreported mail order sales was computed as $6,026,132.

71. On March 28, 1978, the Board mailed to Looart Press, Inc. a "Notice of Determination" for the period commencing January 1, 1972 and ending April 30, 1976, determining a deficiency under the Sales and Use Tax Law in the amount of $344,545.17 tax plus interest thereon amounting to $109,842.76, or a total of $454,387.93. A copy of said Notice of Determination is attached hereto as Exhibit K.

72. On April 24, 1978, plaintiff Looart Press, Inc. paid to the Board $454,387.93, the total amount of tax and interest determined by said Notice of Determination to be due.

73. On October 17, 1978, plaintiff Looart Press, Inc. filed with the Board a "Claim for Refund" of said amount of $454,387.93 based on the grounds alleged in the complaint herein.

74. A hearing on said Claim for Refund was held by the Board on August 18, 1980. On October 10, 1980, the Board mailed to Looart Press, Inc. a "Notice of Denial of Claim for Refund," advising that the Board had denied the claim for refund on October 1, 1980. A copy of said Notice of Denial of Claim for Refund is attached hereto as Exhibit L.

75. Looart Press, Inc. has exhausted its administrative remedies and has timely commenced this action for refund of the payment described above.

76. The parties will make any computations necessary for inclusion in appropriate findings after the court's decision in this matter. In the event the parties are unable to agree on the computation, the case may be re-

opened by either party to submit any additional evidence which may be required.

Dated: July 29, 1983

BANCROFT, AVERY & McALISTER

By: MICHELE R. McNELLIS
Attorney for Plaintiff

Dated: July 29, 1983

JOHN K. VAN DE CAMP
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